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No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1958

SIDNEY J. MASSICOT, ROBERT R. LIRETTE AND JAMES F. DONNELLY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF TO THE UNITED STATES BRIEF IN OPPOSITION

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The Government's brief in opposition re-stating the "Questions Presented" (Gov't Br. 1), totally ignores what petitioners' consider to be the principal question presented, viz., whether the interception and divulgence of *intra*-state telephone communications constitutes a crime against the United States. (Question 1 (B), Pet. Br. 2).

The Government, in a single paragraph under the "Argument" section of its brief, discusses this question summarily and cites *Weiss* v. *United States*, 308 U. S. 321, 329, as authority for the proposition that intrastate, as well as interstate, communications are protected by 47 U.S.C. 605 against interception and divulgence. (Govt. Br. 9, 10).

With respect to the Weiss case, it is petitioners' contention that this Court in the Weiss case was concerned with Section 605 only insofar as that statute purported to create a rule of evidence for federal courts, anything said by this Court in that case regarding the intention of Congress, or the power of Congress, to make it a *criminal offense* to intercept and divulge intrastate communications, was mere *dictum*. For, this Court specifically stated in the Weiss case that its decision was "limited" to the question of "whether the trial court properly received in evidence certain intercepted telephone communications." (308 U. S. at page 326).

But if this Court should now agree with the lower Court that the *dictum* in Weiss was binding on that court in the instant case, then it is the petitioners' contention that it is now time for this Court to reappraise the Weiss decision insofar as that decision purports to interpret Sec. 605 as a criminal statute.

Petitioners have no quarrel with the Weiss decision insofar as it holds that intercepted intrastate communications are inadmissible as evidence in federal courts, and it may even be conceded that the Weiss decision correctly holds Sec. 605 penalizes the interception and divulgence of interstate communications by wire or radio; but petitioners do contend that the Weiss decision is erroneous insofar as it purports to hold that it is a criminal offense to intercept and divulge purely intrastate communications. For, as we pointed out at page 11 of our original brief, the general supervisory and administrative authority of Congress to prescribe rules of Federal procedure undoubtedly gives Congress the right to prescribe evidentiary rules for Fed-

eral courts, but this supervisory authority certainly does not confer upon Congress the right to enact criminal legislation.

Whatever authority Congress has to enact criminal statutes with respect to telephone communications must be found in the interstate commerce clause of the Constitution.

Petitioners, in asking this Court to consider overruling the Weiss decision insofar as that decision purports to interpret Sec. 605 as penalizing the interception and divulgence of purely intrastate communications, would submit three main premises:

1. Congress did not intend the phrase "any communication" in the second clause of Sec. 605 to be interpreted literally (without regard to context) to include any and all communications of any nature whatsoever, but intended that the phrase "any communication" should be limited, modified, and qualified by the words "interstate or foreign" and "by wire or radio," which qualifying terms are used, without exception, in all other instances throughout the Communications Act whenever the phrase "any communication" appears.

2. If Congress intended the phrase "any communication," to be interpreted literally so as to penalize the interception and divulgence of purely intrastate communications, the statute thus interpreted would be unconstitutional as exceeding the powers of Congress under the interstate commerce clause of the Constitution.

3. The challenged phrase "any communication," would render the statute bad for vagueness and uncertainty unless the said phrase is held to be limited, qualified and modified by the words "interstate or foreign," and "by wire or radio."

Unless the phrase "any communication" is interpreted in the light of the context, so as to mean "any interstate or foreign communication by wire or radio," the construction would be ridiculous indeed. Or, *reductio ad absurdum*, "any communication", interpreted literally, might include the signal of a player in a baseball game, or the over-the-fence gossip of housewives.

To avoid such absurd construction, the Government will have to concede, and this Court can hardly avoid holding, that "any communication" must be qualified, at least, by the words "by wire or radio." By what reasoning, then, can the phrase "by wire or radio" be supplied from the antecedent context, without including also the phrase "interstate or foreign"? For these two modifying and limiting phrases are found in tandem, invariably, throughout the entire Communications Act as modifiers of "any communication," with the single exception in the second clause of Sec. 605, where the words "any communication" stand alone.

Petitioners demonstrated in the original brief at pages 11-14 how the failure of Congress to include the phrases "interstate or foreign" and "by wire or radio" in the second clause of Sec. 605 was probably inadvertent, in view of the fact that the language was adopted almost verbatim from the old Radio Act of 1927, which Act pertained only to radio communications, all of which are necessarily interstate.

Unless this Court holds that "any communication" as used in Sec. 605 means "any interstate or foreign communication by wire or radio," petitioners earnestly contend that the statute will be too vague, uncertain, ambiguous and broad to meet the constitutional standards of due process. The broad reach of the word "any," and the unlimited field of communications within the purview of "any communication," is patent. The dictionary definition of "any communication" describes communications of such nebulous amplitude that no person could know what communications were intended by Congress to be protected.

This Court said in the case of *Connally* v. *General Construction Company*, 269 U.S. 385, that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ at its application violates the first principle of due process of law."

The "any communication" phrase of Sec. 605 is baffling not only to "men of common intelligence" but also to many learned jurists of extraordinary intelligence. As petitioners pointed out on page 7 of the original brief, the Honorable William P. Rogers, as Deputy Attorney General in 1933, referred to Sec. 605 as "nebulous." As late as November 1939, the Solicitor General of the United States, who later became a Justice of this Court, argued earnestly, albeit unsuccessfully, in this Court that "The Communications Act shows on its face that it was intended to apply only to interstate and foreign communications." *Weiss* v. *United States*, supra, 308 U.S. at page 322. This same view has been held by many able jurists in the lower courts. For instance, the

Court of Appeals for the First Circuit, in the case of *Valli* v. *United States*, 94 F. 2d. 687, at pages 690, 691, said: " . . . the Communications Act applies only to interstate communications . . . It therefore appears by the very terms of the Communications Act . . . it does not apply to the facts of this case, since all the other intercepted telephone messages were intrastate messages and therefore were not subject to the provisions of the Communications Act . . . No provision of the Federal Constitution or of the Communications Act is violated by intercepting intrastate communications."

Indeed, the trial judge himself, in the instant case, on May 23, 1957, recognized the "nebulous" character of Sec. 605 when he made the following significant statement during argument on Motion in Arrest of Judgment:

> "The unfortunate thing about this particular statute is that there is such a sparsity of jurisprudence which can be used as sign posts or guides in determining just what the statute is intended to cover." (R. 519).

It is respectfully submitted that inasmuch as many learned jurists, including the trial judge in this case and at least one Justice of this Court, have differed or been in doubt as to "just what the statute is intended to cover," then the petitioners in this case, as well as other "men of common intelligence," must "necessarily guess at its meaning and differ at its application" (269 U.S. 335).

What this Court said in the case of *Lanzetti* v. *New Jersey*, 326 U.S. 451, 453, has application here: "No one may be required at peril of life, liberty or property to speculate as

to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."

IMPORTANCE OF THE QUESTION INVOLVED

It is only in recent years that criminal prosecutions have been brought for "wire tapping" under Section 605, although the statute was enacted in 1934. This Court has never yet said, in any case involving *criminal prosecution* for violation of Sec. 605, that *intrastate* as well as interstate communications are covered. This is an important question of criminal law which will arise more and more frequently now that the Government is prosecuting wiretapping, instead of ignoring, condemning or actually perpetrating it as in the past. This is therefore a question which should be re-examined by this Court in the light of changing conditions, changing applications of Sec. 605, and changing policy on the part of Government, so that the lower courts, as well as possible violators and all "men of common intelligence" will know exactly what the statute means, and whether the statute is constitutional as applied to the facts of the instant case.

Respectfully submitted,

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